



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

February 14, 1996

Ms. Alana Holmes  
Staff Attorney  
Legal Services Division  
Texas Natural Resource Conservation Commission  
P.O. Box 13087  
Austin, Texas 78711-3087

OR96-0186

Dear Ms. Holmes:

You ask whether certain information is subject to required public disclosure pursuant to chapter 552 of the Government Code. Your request was assigned ID# 32107.

The Texas Natural Resource Conservation Commission (the "commission") received the following request for information:

1. Personnel files for all employees who have been employed by the Human Resources Division (including employees of the former Equal Opportunity Development Division) for any period between January 1, 1994 and February 1, 1995 . . . specifically, all personnel actions, salary transactions and performance records.
2. Job posting files for all positions posted within the Human Resources Division between January 1, 1994 and February 1, 1995 . . . specifically, a copy of the job posting, all applications, and justification/documentation regarding hire and non-hire.

You have submitted for our review representative samples of the information requested.<sup>1</sup> Also, you have submitted a copy of the EEOC complaint filed by the requestor in which

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<sup>1</sup>In reaching our conclusion here, we assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). This open records letter does not reach, and therefore does not authorize the

she alleges race discrimination against the commission. You contend that the information requested is excepted from required disclosure pursuant to section 552.103(a) of the Government Code.<sup>2</sup>

To secure the protection of section 552.103(a), a governmental body must demonstrate that the requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding to which the state or political subdivision is or will be a party. Open Records Decision No. 551 (1990) at 5. A pending complaint before the EEOC indicates a substantial likelihood of litigation. Open Records Decision No. 336 (1982) at 1. In this case, you have demonstrated that you reasonably anticipate litigation. You must also show how the requested information relates to the anticipated litigation.

The attachment to the EEOC complaint specifically names several employees of the commission. Although you do not assert how the files containing information about these named employees relate to anticipated litigation, the complaint and attachment indicate on their face the required relationship. You may therefore withhold information related to these named employees under section 552.103(a).

Job postings are regularly published and circulated among employees and are available for public inspection. Consequently, the requestor has previously had access to the requested job postings. Further, the requestor created some of the documents included in the representative sample submitted to this office for review. The requestor cannot be denied access under section 552.103(a) to information she has already had the opportunity to review. Open Records Decision Nos. 551 (1990), 454 (1986). Therefore, you cannot withhold the job postings or documents authored by the requestor.

You have not demonstrated how the remaining information relates to anticipated litigation. Moreover, neither the complaint on its face nor the other correspondence you sent to this office indicates how the requested information relates to anticipated litigation. Thus, this office cannot conclude that you have met your burden under section 552.103(a)

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(Footnote continued)

withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

<sup>2</sup>We note that the open records laws were substantially amended by the Seventy-fourth Legislature. Act of May 29, 1995, 74th Leg., R.S., ch. 1035, 1995 Tex. Sess. Law Serv. 5127 (Vernon) (to be codified as amendments to Gov't Code ch. 552). The amendments to chapter 552 "affecting the availability of information, the inspection of information, or the copying of information, including the costs for copying information, apply only to a request for information that is received by a governmental body on or after September 1, 1995." *Id.* § 26(a), 1995 Tex. Sess. Law Serv. at 5142 (Vernon). A request for information that is received by a governmental body prior to September 1, 1995, is governed by the law in effect at the time the request is made. *Id.*

as to the remaining information. The commission may not withhold the remaining information pursuant to section 552.103(a).

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Certain information may therefore be excepted from disclosure under section 552.101 because it is made confidential by statute. A social security number is excepted from required public disclosure under section 552.101 of the act in conjunction with 1990 amendments to the federal Social Security Act, § 42 U.S.C. § 405(c)(2)(C)(viii)(I), *if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. See* Open Records Decision No. 622 (1994). The applicants' files and the employees' files that you submitted for our review contain the individuals' social security numbers. Federal law may prohibit the disclosure of these social security numbers if they were obtained or are maintained by the commission pursuant to any provision of law enacted on or after October 1, 1990. Based on the information you have provided, we are unable to determine whether the social security numbers at issue are confidential under this federal statute. We note, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Therefore, prior to releasing any social security number information, the commission should ensure that the information is not confidential under this federal statute.

In addition to social security numbers, we note that some of the information submitted for our review reveals the home addresses and telephone numbers of government employees or former employees. If these employees made an election under section 552.024 that this information be kept confidential, the commission must withhold that information under section 552.117 of the Government Code.<sup>3</sup>

Section 552.101 also excepts from disclosure information protected by common-law privacy. Information must be withheld under common-law privacy if it meets the criteria the Supreme Court of Texas articulated for section 552.101 in *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Under *Industrial Foundation*, a governmental body must withhold information on common-law privacy grounds only if the information is highly intimate or embarrassing *and* it is of no legitimate concern to the public. We have reviewed the representative sample of documents you submitted to this office, and we did not discover any information that is protected by common-law privacy. However, we urge you to exercise caution before releasing all information responsive to the request, as information commonly found in personnel files may be protected by common-law privacy or a confidentiality statute. *See* Gov't Code § 552.352 (providing penalties for improper

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<sup>3</sup>You may not, however, withhold the home address or telephone number of an employee who made the request for confidentiality under section 552.024 after the requests for information at issue in this ruling were made. Whether a particular piece of information is public must be determined at the time the request for it is made. Open Records Decision No. 530 (1989) at 5.

release of confidential information). We have enclosed a list of information that is confidential by law. We suggest that you use this list as a guideline for releasing information from personnel files.

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in cursive script that reads "Karen Hattaway". The signature is written in black ink and is positioned above the typed name and title.

Karen E. Hattaway  
Assistant Attorney General  
Open Records Division

KEH/ch

Ref: ID# 32107

Enclosures: Submitted documents, Confidentiality list

cc: Ms. Cindy L. Gage  
2708 Edenwood  
Austin, Texas 78745  
(w/ Confidentiality list)